FILE COPY

No. ~~1012~~ 300

In the Supreme Court

OF THE

UNITED STATES

October Term, 1922

WESTERN UNION TELEGRAPH COMPANY,
a corporation,

Petitioner,

vs.

J. A. CZIZEK,

Respondent.

Petition for Writ of Certiorari, Motion, Notice, and Brief in Support of Petition.

FRANCIS R. STARK,
New York City,

RICHARDS & HAGA,
Boise, Idaho,

BEVERLY L. HODGHEAD,
San Francisco, California,
Attorneys for Petitioner.

The James H. Barry Co., 1122 Mission St., San Francisco.

INDEX

TABLE OF CASES REFERRED TO BY PETITIONER

In the Supreme Court

OF THE

UNITED STATES

OCTOBER TERM, 1922

WESTERN UNION TELEGRAPH COMPANY, a corporation,
Petitioner,

vs.

J. A. CZIZEK,
Respondent.

Petition for Writ of Certiorari, Motion, Notice, and Brief in Support of Petition.

NOTICE OF MOTION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To Respondent in the above entitled action and to Richard H. Johnson and Carey H. Nixon, his Attorneys:

Please take notice that on Monday, the 7th day of May, 1923, at the opening of the court on that

day, or as soon thereafter as counsel can be heard, petitioner, the Western Union Telegraph Company, a corporation, will, upon its verified petition and copies of the entire record in this cause, submit a motion for a writ of certiorari herein (a copy of which said motion and of the petition for said writ, and brief in support thereof, are herewith delivered to you), to the Supreme Court of the United States in its court room at the City of Washington, District of Columbia.

Dated: San Francisco, April 5th, 1923.

FRANCIS R. STARK,
RICHARDS & HAGA,
BEVERLY L. HODGHEAD,
Counsel for Petitioner.

In the Supreme Court

OF THE

UNITED STATES

OCTOBER TERM, 1922

WESTERN UNION TELEGRAPH COMPANY, a corporation,
Petitioner,

vs.

J. A. CZIZEK,
Respondent.

MOTION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Comes now the Western Union Telegraph Company, a corporation, by its counsel, Francis R. Stark, Richards & Haga, and Beverly L. Hodghead, appearing in that behalf, and moves this Honorable Court that it shall, by certiorari or other proper process, directed to the Honorable Justices of the United States Circuit Court of Appeals for the Ninth Circuit, require said Court to certify to this Court for its review and determination that certain cause lately pending in said Circuit Court of Appeals numbered 3885 upon the docket of said Court, in which your

petitioner, the Western Union Telegraph Company, was plaintiff in error, and respondent herein, J. A. Czizek, was the defendant in error; and to that end your petitioner now tenders herewith its petition containing a brief statement of the facts and objects of the motion, and its brief in support thereof, with a certified copy of the entire record in said cause in said Circuit Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California, April 5th, 1923.

FRANCIS R. STARK,
RICHARDS & HAGA,
BEVERLY L. HODGHEAD,
Counsel for Petitioner.

In the Supreme Court

OF THE

UNITED STATES

OCTOBER TERM, 1922

WESTERN UNION TELEGRAPH COMPANY, a corporation,
Petitioner,

vs.

J. A. CZIZEK,
Respondent.

Petition for Writ of Certiorari

To the United States Circuit Court of Appeals for the Ninth Circuit requiring it to certify to the Supreme Court of the United States for its review and determination the cause entitled "Western Union Telegraph Company, a corporation, Plaintiff in Error, vs. J. A. Czizek, Defendant in Error," lately pending in said Circuit Court of Appeals and numbered 3885 therein.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Western Union Telegraph Company, a corporation, respectfully prays for a writ of

certiorari herein to review the decision of the Circuit Court of Appeals for the Ninth Circuit, affirming the judgment of the District Court of the United States for the District of Idaho, Southern Division, awarding the respondent herein damages in the sum of $4500, with interest thereon, for the failure to transmit and deliver to respondent a certain telegraphic message from Boise City, Idaho, to the City of Oakland, in the State of California.

QUESTIONS INVOLVED.

The cause involves the validity and legal effect of the provisions and stipulations upon the telegraph blanks filed with and approved by the Interstate Commerce Commission and generally in use throughout the United States, upon which the message in question was written, relating

1st, to the liability of telegraph companies for the delays or failure in transmission or delivery or for *non-delivery* of unrepeated messages;

2nd, to the liability of said company under the provision upon said message blank, agreed upon between the sender of said message and the telegraph company, placing a value upon said message for rate-making purposes beyond which said company should not be liable in case of delays in the transmission or delivery, or in the case of *non-delivery* of said message.

Said decision of said Circuit Court of Appeals

denied to this petitioner the defense to said action provided by the terms and conditions, stipulations, rules, regulations and classifications printed upon said message blank relating to the liability of said petitioner in the transmission and delivery of said message and held that the same did not constitute a defense to the claim for damages alleged to have arisen through the failure to transmit and deliver said message. The said decision is in conflict with the decisions of this Court and with the decisions of the United States Circuit Court of Appeals of other circuits, and with the decisions of the Supreme Courts of various states, and is in conflict with the decision of the Interstate Commerce Commission with respect to the scope of said rules, regulations and classifications of messages.

STATEMENT OF CASE

The petitioner, Western Union Telegraph Company, is a corporation chartered under the laws of the State of New York, and carries on a general telegraph business throughout all the states of the United States. On the 30th day of November, 1917, the respondent, who was plaintiff in the Court of Appeal, was the owner of fifty shares of stock in the Idaho National Bank, having the par value of $100 per share. On that date, one T. J. Jones, agent of respondent, delivered to the Western Union Telegraph Company at its office in Boise a telegram addressed to

respondent, J. A. Czizek, at Oakland, California, reading as follows:

> "Send the following telegram, subject to the terms on back hereof, which are hereby agreed to.
>
> Boise, Idaho, Nov. 30, 1917.
>
> J. A. Czizek,
> 5767 Shafter Avenue,
> Oakland, Calif.
>
> Miller advises Idaho National sold to Pacific offers me ninety dollars per share otherwise wait year and chances of liquidation says if fails to get two thirds stock liquidation will follow. Will you take ninety dollars per share for yours I am inclined to accept offer for mine Answer.
>
> T. J. JONES,
> (454 Yates B)
> (.65c) (408-W)"

The message blank on which said telegram was written contained among other things the following conditions, subject to which said message was accepted for transmission: (See Trans. pp. 43-46.)

> "*All telegrams taken by this company are subject to the following terms*:
>
> "To guard against mistakes or delays, the sender of a telegram should order it REPEATED, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated telegram rate is charged in addition. Unless otherwise indicated on its face, THIS IS AN UNREPEATED TELEGRAM

AND PAID FOR AS SUCH, in consideration whereof it is agreed between the sender of the telegram and this Company as follows:

"1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED telegram, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED telegram, beyond fifty times the sum received for sending the same, *unless specially valued;* nor in any case for delays arising from unavoidable interruption in the working of its lines; *nor for errors in cipher or obscure telegrams.*

"2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the non-delivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of FIFTY DOLLARS, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof.

* * * * * * * * * *

"6. The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty

days after the telegram is filed with the Company for transmission.

* * * * * * * * * * *

"8. No employee of the Company is authorized to vary the foregoing."

The said telegram was an unrepeated message of the class known as Night Letter and was valued at not to exceed $50 in accordance with provisions of the said telegraph blank above set forth, and was delivered to and accepted by defendant for transmission subject to said terms and conditions relating to unrepeated messages, and no additional sum was paid or agreed to be paid for sending said telegram based upon any value in excess of said sum of $50. (See Finding VII, Tr. p. 47.)

Prior to the time said telegram was received and accepted for transmission, the rules, rates, charges and classifications of messages established by the defendant, as set out on said blank on which said telegram was written, and the form of said blank had been filed with the Interstate Commerce Commission and the said Commission had acquiesced in and approved the terms, conditions, rates, charges and classifications thereby established. (Finding IX, Tr. p. 47.)

Respondent Czizek never received the telegram and before he learned that such message had been sent to him, the Idaho National Bank went into

liquidation. Afterwards respondent instituted this action against petitioner herein, claiming that if he had received the message in question he would have sold his stock to Miller and would have received the sum of $4500.

Among other defenses interposed in said action, the defendant therein, the petitioner in this proceeding, pleaded and offered in evidence the written stipulation of the parties the rules, regulations and classifications of messages above set out subject to which the message was received and accepted for transmission and which defined the liability of the telegraph company and prescribed the terms and conditions under which said message was received. This petition for certiorari is based upon the fact that, notwithstanding the decisions of the Supreme Court of the United States recently rendered and the decisions of the Circuit Court of Appeals of other circuits, and the decisions of other Supreme courts, the Circuit Court of Appeals for the Ninth Circuit in this case failed to uphold and give effect to the provisions of said written stipulations and regulations of liability approved by the Interstate Commerce Commission and established by Act of Congress for the purpose of securing the uniformity of rate and uniformity of liability in respect to the transmission of interstate messages.

HISTORY OF CASE.

The said cause was twice before the Circuit Court of Appeals and twice before the District Court. At the first trial of said cause in the District Court, the Court upheld the provisions upon said message blank relating to unrepeated messages and to messages valued at the sum of $50, and held that said clauses of said regulations were controlling in said action. (See opinion of Judge Dietrich, Tr. p. 152.) This decision was reversed by the Circuit Court of Appeals for the Ninth Circuit, the Court holding that the regulations of the Company with relation to unrepeated messages and valued messages above referred to, and the classifications on file with the Interstate Commerce Commission did not apply to the case of a message which, although it had been received and accepted by the telegraph company for transmission, was nevertheless through negligence not forwarded from the originating office. It was here held that non-transmission from the originating office where the message was filed and accepted without excuse therefor is not embraced within the regulations referred to and that such regulations if applicable, would be against public policy. (See opinion Circuit Court of Appeals, Tr. p. 161, 272 Fed. 223.) The cause was retried before the District Court in Idaho upon the same record, with certain additional testimony as to negligence, and the trial Court, after making the

special findings above referred to (Tr. pp. 41-51), concluded as follows:

> "2. It being the view of the Circuit Court of Appeals, as here understood, that the defensive provisions endorsed on the telegram are inapplicable because the telegram was not transmitted at all, it is accordingly held that plaintiff is entitled to judgment for damages in the sum of Forty-Five Hundred Dollars ($4,500) with interest thereon from the 18th day of June, 1918, at the rate of 7% per annum, together with costs of suit."

This judgment was affirmed by the Circuit Court of Appeals (See Tr. p. 143). Meanwhile, the Supreme Court of the United States had decided the case of Western Union Telegraph Co. vs. Esteve Bros., 256 U. S. 566, holding that the sender of an unrepeated message at the lower rate cannot escape the attendant limitation of liability. Notwithstanding this decision, it was held by the Circuit Court of Appeals that its decision on the former appeal (272 Fed. 223) had become the law of the case, and was controlling of this appeal. It is to review this decision and the decision of the Court on the former appeal holding that the rules and regulations and conditions printed on the message blank and filed with the Interstate Commerce Commission did not constitute a defense in the action, that petitioner is seeking this writ of certiorari.

REASONS WHY THE WRIT OF CERTIORARI SHOULD ISSUE.

The principal ground upon which the petitioner urges that a writ of certiorari should issue is the conflict of decision between the Circuit Court of Appeals in this case (both on the present appeal and on the former appeal), and the Supreme Court in its decisions in

Western Union v. Southwick, 233 US. 569.

Western Union v. *Esteve Bros. Co.*, 256 U. S., 566, and

Western Union v. *Boegli*, 251 U. S. 315;

Postal Telegraph Co. v. *Dickerson*, 251 U. S. 609;

Postal Telegraph Co. v. *Warren Godwin Lumber Co.*, 251 U. S., 27,

with respect to the scope and controlling effect of said rules and regulations concerning the classification of messages, and the rates and extent of liability thereunder.

Your petitioner is advised by counsel that said decision of said Circuit Court of Appeals in regard to the legal effect of said written stipulations, rules and regulations and classifications of messages under which said message was received and accepted for transmission, as above set forth, is not well founded in law; that it is inconsistent with the decisions of this Court, especially the decisions just above referred

to, and is in conflict with the decisions of the United States Circuit Court of Appeals in other circuits, and of other Supreme Courts, which opinions will be reviewed in the brief of petitioner, attached hereto, and that said decision is against law for the reason that notwithstanding said message was filed with said telegraph company, petitioner herein, and accepted for transmission with the direction that it be transmitted as an unrepeated message, valued at a sum not to exceed $50, the Court held that the liability of defendant, the petitioner herein, was not determined or controlled by said written rules, regulations, and agreements, and that they did not constitute a defense to said action and that defendant, petitioner herein, was liable for the full amount of said loss, to-wit, the sum of $4500. Your petitioner is advised and believes that in order to secure uniformity of decision with respect to said rules and regulations under which all telegraph messages are received and accepted for transmission and delivery, and because of the great multitude of messages which are transmitted from day to day throughout the United States and foreign countries, written upon the message blanks containing the same conditions and limitations of liability, and because of the gravity of said question and its importance to the general public, said decision of said Circuit Court of Appeals ought to be reviewed and said questions arising upon the construction and application of said provisions of said message blank be finally

determined by this Court by a writ of certiorari to said Circuit Court of Appeals.

These questions, respectively, were raised and presented to said Circuit Court of Appeals by Assignment of Errors (Tr. pp. 126-129) which petitioner avers were committed by the District Court upon the trial of said cause, and the rendition of said judgment. Your petitioner has no right of appeal or writ of error to this Honorable Court, because the jurisdiction of the District Court in this cause was invoked solely on the ground of the diversity of citizenship. The Circuit Court of Appeals has stayed its mandate in order to allow time for the presentation and determination of this petition.

Your petitioner presents herewith as a part of this petition a brief showing more fully its views upon the questions involved, and its reasons for believing these questions to be of sufficient importance to justify the issuance of the writ of certiorari to said Court of Appeals. Your petitioner also presents and files herewith as an exhibit to this petition a duly certified copy of the entire transcript of the record in said cause including the proceedings in the Circuit Court of Appeals for the Ninth Circuit.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, requiring said Court to certify and send to this Court on a day cer-

tain to be therein designated, a full and complete transcript of the record and all the proceedings in said Circuit Court of Appeals in that certain action entitled "Western Union Telegraph Company, a corporation, Plaintiff in Error vs. J. A. Czizek, Defendant in Error" No. 3885 upon the records of said Court, to the end that said cause may be reviewed and determined by said Court, as provided by law, and that this Honorable Court may thereupon proceed to correct said errors complained of and that the judgment of said Circuit Court of Appeals may be so modified as to reverse said judgment of said District Court in said cause.

And your petitioner will ever pray.

WESTERN UNION TELEGRAPH COMPANY, a corporation,
Petitioner.

By FRANCIS R. STARK,
New York City,

RICHARDS & HAGA,
Boise, Idaho,

BEVERLY L. HODGHEAD,
San Francisco, California,
Counsel for Petitioner.

STATE OF CALIFORNIA,
City and County of San Francisco—ss.

BEVERLY L. HODGHEAD, being duly sworn, says: That he is counsel for the petitioner named in and who subscribed the foregoing petition; that he has read the foregoing petition for writ of certiorari; that the allegations thereof are true, as he verily believes; that the points raised therein in his opinion are meritorious; that said petition is not filed for the purpose of delay; that this affidavit is made by him instead of being made by his client because the matters alleged in said petition relating almost wholly to the proceedings in court are better known to affiant than to his said client.

BEVERLY L. HODGHEAD.

Subscribed and sworn to before me
this 9th day of April, 1923.

CHARLES E. REITH,
Notary Public in and for the City and
County of San Francisco
State of California

[Title of Court and Cause.]

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

The message in suit was filed with the Western Union Telegraph Company, petitioner herein, at Boise, Idaho, on the 30th day of November, 1917, to be transmitted to respondent at Oakland, California. It related to the sale of certain bank stock belonging to respondent. Through the negligence of the Company's servants at the originating office, *after the message had been received and accepted*, it failed of transmission and was *not delivered*. Respondent did not learn of the alleged offer until some months afterwards, and meanwhile the bank had gone into liquidation and respondent brought this action against the telegraph company to recover damages claimed to have been suffered by him through the failure to transmit and deliver the telegram. The suit was removed to the Federal Court by reason of the diversity of citizenship of the parties. The District Court at the first trial gave judgment for the defendant, which was reversed on writ of error to the United States Circuit Court of Appeals for the Ninth Circuit (272 Fed. 223). Upon a retrial, the District Court, in deference to the views expressed in that opinion, gave judgment for the plaintiff for the

amount sued for, which judgment was affirmed, the Court holding that its decision upon the former appeal had become the law of the case. It is to review these decisions of the Circuit Court of Appeals that petitioner seeks this writ of certiorari.

The message in suit was written on one of the usual printed blanks furnished by the telegraph company, containing the stipulations, rules, regulations and classifications of messages authorized by the Act of Congress and filed with and approved by the Interstate Commerce Commission. It contained among others, the following conditions.

> "*All telegrams taken by this company are subject to the following terms*:
>
> "To guard against mistakes or delays, the sender of a telegram should order it REPEATED, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated telegram rate is charged in addition. Unless otherwise indicated on its face, THIS IS AN UNREPEATED TELEGRAM AND PAID FOR AS SUCH, in consideration whereof it is agreed between the sender of the telegram and this Company as follows:
>
> "1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED telegram, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery of any

REPEATED telegram, beyond fifty times the sum received for sending the same, *unless specially valued;* nor in any case for delays arising from unavoidable interruption in the working of its lines; *nor for errors in cipher or obscure telegrams.*

"2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the non-delivery of this telegram, whether caused by negligence of its servants or otherwise, beyond the sum of FIFTY DOLLARS, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof.

* * * * * * * * * * *

"6. The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the Company for transmission.

* * * * * * * * * * *

"8. No employee of the Company is authorized to vary the foregoing."

The message was filed with the telegraph company at one of its regular offices for receiving messages and was classified by the sender as an *unre-*

peated night letter, valued at not to exceed fifty dollars. It was accepted as such for transmission and delivery and *the rate paid was based upon this classification and value.* The decision of the Circuit Court of Appeals denied to petitioner the defense of this limitation of liability, and the telegraph company brings this petition for certiorari contending that said decision is in conflict with the decisions of this Court in several recent cases defining the scope and purpose of the Act of Congress of July 18, 1910 (36 Stat. L. p. 339) and is also in conflict with decisions of other circuits.

PURPOSE OF ACT OF CONGRESS

The dominant purpose of the Act of Congress was to take over and subject to a uniform national rule under the administrative control of the Interstate Commerce Commission, the *entire field of interstate telegraphy.* It was intended, as construed by the decisions of this Court, to secure entire equality and uniformity, not only of rates but of *liability* in respect to all messages sent in interstate commerce.

It was held, however, by the Circuit Court of Appeals in its first opinion, which it decided had become the "law of the case," that while the rules and regulations referred to, filed with and approved by the Interstate Commerce Commission, are valid and binding on the users of the telegraph in interstate business, they have no application to a case where the message, although received and accepted for trans-

mission under the classifications above made, fails through the fault of the company's employees at the originating office and is therefore not transmitted nor delivered. Petitioner, on the contrary, contends that its liability in respect to said message became fixed and determined when it was filed and accepted for transmission and classified by sender for rate-making purposes under the provisions of the Act of Congress, and the regulations of the Interstate Commission.

There can be no dispute that the message, when filed and accepted for transmission and classified as to rate and value, is in interstate commerce. The decision of the Circuit Court of Appeals, however, excludes from the operation of the rule of equality and uniformity those messages which failed of transmission and delivery through negligence of the employees at the office where said messages are filed for transmission, and restricts the operation of the Act of Congress under said rules and regulations to but a portion only of interstate messages. The decision of the Circuit Court of Appeals is based on the theory that a *contract* was made between the company and the sender of the message and that there was an entire failure of performance on the part of the telegraph company by its neglect to put the message in course of transmission. Yet this Court has said in the case of

Western Union Telegraph Co. v. *Esteve Bros. Co.*, 256 U. S. 566,

that the Act of Congress introduced a new principle into the legal relations of the telegraph companies with their patrons, and that the liability in *all* cases is fixed, *not by contract*, but as a matter of *law*. The language of the Court, found at page 572, is as follows:

> "Uniformity demanded that the rate represented the whole duty and *the whole liability* of the company. *It could not be varied by agreement;* still less could it be varied by lack of agreement. The rate became, *not*, as before, a matter of *contract*, by which a legal liability could be modified, but as a *matter of law*, by which the uniform liability was imposed." (Italics ours.)

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES

The decisions of the Circuit Court of Appeals in this case excludes from the operation of the uniform national rule of liability established by the Act all interstate messages which fail of transmission and delivery through the negligence of the company's employes at the *office where the message is filed* for transmission and restricts the operation of the Act of Congress and of such rules and regulations to cases where the negligence occurred at intermediate or terminal offices of the company. It establishes two classes of interstate messages, in one of which the tele-

graph company is still subject to its common-law liability, and in the other the liability is controlled as a matter of law by the Act of Congress. The Supreme Court has said that *all* messages are controlled by the Act of Congress. The *Esteve Bros. Co.* case, *supra,* was decided by this Court *after* the first decision of this case by the Circuit Court of Appeals (272 Fed. 223). The *Esteve* case was not a case where the message failed at the originating office, but the principles, however, settled by that decision with respect to the scope and purposes of the Act of Congress are sufficiently comprehensive to be controlling in any case respecting transmission or delivery, or, as in this case, the *non-delivery* of an interstate telegram. It was there held that the sender of a message, without assent in fact to the provisions limiting liability, is nevertheless bound thereby as a matter of law, because they are a part of the lawfully established rate. Basing the liability, ***not upon contract,*** but upon the Federal law which secures and exacts a uniform rate and a uniform *liability* in respect to all interstate messages, the Court said, pages 571-2:

> "The Act of 1910 introduced a new principle into the legal relations of the telegraph companies with their patrons which dominated and modified the principles previously governing them. Before the Act the companies had a common-law liability from which they might or might not extricate themselves, according to views of policy prevailing in the several States. *Thereafter, for all messages*

sent in interstate or foreign commerce, the outstanding consideration became that of uniformity and equality of rates. Uniformity demanded that the rate represent the whole duty *and the whole liability of the company.* It could not be varied by agreement; still less could it be varied by lack of agreement. The rate became, *not*, as before, a matter of contract, by which a legal liability could be modified, but as a matter of *law*, by which a uniform *liability* was imposed. Assent to the terms of the rate was rendered immaterial, because, when the rate is used, dissent is without effect."

The present case comes within the express terms of the regulation. The message was not delivered, and all cases of non-delivery are covered by the stipulations.

The message was in interstate commerce when it was received by the company for transmission. It was an unrepeated message and paid for as such. "The limitation of liability was an inherent part of the rate" (page 571). It is binding upon all persons until set aside by the Commission.

The Court in the *Esteve* case further said, page 573:

"The rule does not rest upon the fiction of constructive notice. It flows from the requirement of equality and uniformity of rates laid down in Section 3 of the Act to Regulate Commerce. Since any deviation from the lawful rate would involve an undue preference or an unjust discrimination,

a rate lawfully established must apply *equally to all* whether there is knowledge of it or not."

The Court said in the quotation given above, "before the Act, the companies had a common-law liability from which they might, or might not extricate themselves, according to views of policy prevailing in the several States." If the decision of the Circuit Court of Appeals in this case be upheld, then as to a portion of the messages in interstate commerce the company is still subject to its common-law liability from which it may or may not extricate itself "according to views of policy prevailing in the several States." It was to prevent these inequalities and discriminations that the Act of Congress was adopted.

Under the rule of the Circuit Court of Appeals the sender of an unrepeated message carrying the lowest rate, and valued at the lowest sum, and which, under the regulations, was to be transmitted at the sender's risk, may, nevertheless, recover the full amount of his loss. Yet, one who sends a *repeated* message or even a message *insured for its full value* and pays the highest rate can recover no more. In the *Esteve* case, page 575, the Court says these high rates "were open to any one who wished to pay the extra amount *for extra security.*" Where one who pays the lowest rate under the *lowest* classification, receives the *same* security as he who pays the *highest* rate, the purpose of the Act to secure equality and uniformity of liability is nullified and destroyed. This Court has said

in the same case that "uniformity demanded that the rate represent the whole duty and the *whole liability of the company*. It could not be varied by agreement." If such liability cannot be varied by agreement, but applies as a matter of law to all cases in interstate commerce, the *Court* cannot establish a different liability and measure damages according to the rules of common law.

We contend that the regulations apply to the present case. A message is in interstate commerce from the time it is received until the time it is delivered, and not merely from the time it is placed on the wire. The Act of Congress took over the regulation of the *entire field of interstate telegraphy*, not a part of it. The Act does not except from its operation the negligence of employes at the originating office.

Many States have enacted statutes imposing penalties upon telegraph companies for failure to forward messages in proper order, or to make prompt delivery of messages. The telegram in question was not forwarded in its proper order and the company thereby may have been, in terms at least, subject to the penalty of the local statute. But these State statutes have now been held to be inoperative as to interstate messages, because the Act of Congress subjected the entire field of interstate telegraphy to Federal control.

The Court said in

Western Union v. *Boegli*, 251 U. S., 315, 64 L. Ed., 281.

"As the result of doing so, we are of opinion that the provisions of the statute bringing telegraph companies under the Act to Regulate Commerce, as well as placing them under the administrative control of the Interstate Commerce Commission, so clearly establish the purpose of Congress to subject such companies to a uniform national rule as to cause it to be certain that there was no room thereafter for the exercise by the several States of power to regulate, by penalizing the negligent failure to deliver promptly an interstate telegram, and that the Court below erred, therefore, in imposing the penalty fixed by the State statute."

The Circuit Court of Appeal in the former decision, said: "This is not an instance of delay or error in transmission or in delivery," which, of course, is true, but it is, however, a case of *non-delivery* which is expressly provided for in the terms of the regulation.

We urge that the former decision is contrary to the rule expressed by the Supreme Court in the case of

Postal Tel. Co. v. *Warren Godwin Lumber Co.*, 251 U. S., 27.

It was there said by this Court, at page 30, as follows:

> "We think it clear that the Act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates which it was manifestly the dominant purpose of the Act to Regulate Commerce to establish—a purpose which would be wholly destroyed if, as held by the Court below, the validity of contracts made by telegraph companies as to their interstate commerce business continued to be subjected to the control of divergent, and it may be, conflicting, local laws."

If the rule of the former decision in this case is to prevail, then the liability in any case of non-transmission will be made to depend upon the accident of jurisdiction, not upon the Act of Congress.

In determining the liability of the telegraph company with respect to an interstate message, it is not necessary to inquire whether the loss arose from one cause or another, whether from error or delay or non-delivery, or because of negligence at the sending or receiving office, but only if it was an interstate message, in which case it comes within the Federal rule of uniformity and equality and is no longer "subjected to the control of divergent and, it may be conflicting, local laws." This Court, in the *Esteve Bros.* case, we contend, did not simply determine the liability of the telegraph company in the case of error in

transmission, but fixed the Federal rule in respect to interstate messages as a whole and the validity of the regulations approved by the Commission. It did not leave the law unsettled as to losses arising from delay or non-delivery. It holds that the Federal law now fixes the rule for determining the liability of the telegraph company in case of negligence of any of its employes. The Act does not except from its operation the negligence of employes at the office where the message is filed. If it be held that the losses in connection with interstate messages resulting from the negligence of employes at the sending office are not within the Federal rule, then the Act of Congress did not take over the entire field of interstate telegraphy as declared by the Supreme Court. There would be a gap which is still subject to State regulation and common-law liability, and to the control of local laws.

THE DECISION OF THE CIRCUIT COURT OF APPEALS CONFLICTS DIRECTLY WITH THE CASE OF POSTAL TELEGRAPH CO. V. DICKERSON, 254 U. S., 609.

Petitioner contends that the decision of the Circuit Court of Appeals in this case conflicts directly with the memorandum opinion and order reversing judgment in

Postal Telegraph Co. v. *Dickerson*, 254 U. S., 609.

The Court of Appeals, in its first decision of the present case, refers to "the absence of a controlling decision" (Tr., p. 170). We respectfully urge that all of the above decisions of the Supreme Court are controlling decisions, inasmuch as they interpret the purpose of the Act of Congress to have been to subject the whole field of interstate telegraphy to one uniform national rule, and to the administrative control of the Interstate Commerce Commission. The Court of Appeals, in referring to the absence of a controlling decision, undoubtedly meant a case in which there was a total failure of transmission. But such a case is found in *Postal Telegraph Co.* v. *Dickerson, supra.* The opinion in that case is a memorandum opinion, but the facts are stated in the decisions of the State court in the same case reported at 114 Miss., 115, which shows, page 117, that the message was filed with the Postal Telegraph Co. which *failed to transmit it.* The facts of this case are also reviewed in *Warren Godwin* case, 116 Miss., 660.

Dickerson sued both the Postal Telegraph and the Western Union Telegraph Company for damage for mental anguish for the *failure to transmit* and make prompt delivery of an interstate telegram from Tupelo, Miss., to Guin, Ala., announcing the death and burial of a relative, *and charging gross negligence.* The message was *filed with the Postal Telegraph Company,* but that company, although it had an office at both points above named, *did not transmit or make*

any effort to transmit the message, but merely delivered it to the Western Union. The trial Court, following the *Showers* case, referred to by Chief Justice White in the *Warren Godwin Lumber Co.* case, 251 U. S., 28, decided for the defendants. On appeal, the Supreme Court of Mississippi receded from its decision in the *Showers* case, and held that the case did not come under the operation of the Federal rule and reversed the decision.

See

Dickerson v. *Western Union,* 114 Miss., 115, 74 So., 779.

This ruling was reversed or disapproved by the Supreme Court in the *Warren Godwin* case, *supra;* but in the meantime the *Dickerson* case had been retried in Mississippi and judgment given against the *Postal Company* for $300 damages, and this judgment was affirmed by the Supreme Court of Mississippi in

Postal Telegraph Co. v. *Dickerson,* 79 S., 719.

The Postal Company then petitioned the Supreme Court of the United States for a *certiorari,* which was granted, see

Postal Telegraph Co. v. *Dickerson,* 248 U. S., 555,

and the cause on hearing was *reversed.*

Postal Telegraph Co. v. *Dickerson,* 254 U. S., 609.

The memorandum decision reciting:

> "Per curiam: Reversed upon the authority of *Postal Teleg. & Cable Co.* v. *Warren Godwin Lumber Co.*, 251 U. S., 27, and *Western Union* v. *Boegli*, 251 U. S., 315."

It will be observed that it was here held upon the authority of a case involving an *error* in transmission that the same rule applies where there was a *total failure of transmission*, from which it follows that the Federal rule is controlling in respect to all interstate messages.

In the *Dickerson* case the complaint also charged *gross negligence* and wilful misconduct in its *total failure to transmit the message*. In referring to that case, this Court in *Postal Telegraph Co.* v. *Warren Godwin Lumber Co.*, 251 U. S., 27, speaking through Chief Justice White, said:

> "For the sake of brevity, we do not stop to review the cases which perturbed the mind of the Court in the *Dickerson* case as to the correctness of its ruling in the *Showers* case (citing cases), but content ourselves with saying that we are of the opinion that the effect so given to them was a mistaken one."

The case of *Norris* v. *Western Union Tel. Co.*, 174 N. C., 92, which is among the cases expressly approved in the *Warren Godwin* case and on which the Court in part bases its opinion, was a case of *failure*

to deliver. The Supreme Court in the *Warren Godwin* case did not undertake to specify the particular cases in which the message contracts applied, but in effect held that Congress by the Act of 1910 has occupied the *entire field,* and extended the power of Congress over the rates of telegraph companies for all interstate business and all contracts made by them as to such subject, and has vested the power to determine the reasonableness of the rates, rules, contracts and practices of such interstate telegraph companies in the first instance in the Interstate Commerce Commission.

In the case of

Western Union v. *Orr.* (Okla.), 158 Pac., 1139

the action was "for damages for negligently failing to *transmit* and deliver" a message. The Court held that the regulations above referred to were controlling as to the measure of damage.

See also

Hartness v. *W. U. Tel. Co.*, 99 S. E., 759;
W. U. Tel. Co. v. *Lee*, 192 S. W. 70;
W. U. Tel. Co. v. *Hawkins*, 73 So., 973.

We urge that the case comes within the scope of the Act of Congress and strictly within the terms of the provisions limiting liability in case of *non-delivery* of messages. The Court of Appeal says, near the close of its first Opinion, "Non-delivery might be caused

by the carelessness of a boy employed by a *receiving* (that is terminal) office to deliver a transmitted message," which is true, but it may in the same manner be caused by the carelessness of the boy employed at the *sending office*, both of whom are engaged in interstate commerce. There is no distinction between the two cases except as to the extent of performance of the contract; but this Court has said that the liability is not fixed by contract, but is fixed *as a matter of law* as in the *Esteve Bros.* case where there was no contract at all.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER COURTS IN RESPECT TO THE VALUATION CLAUSE OF THE MESSAGE REGULATIONS.

The second regulation, above quoted, provided that the company should not *in any event* be liable for damages for delays or *non-delivery, whether caused by the negligence* of its servants or otherwise, beyond the sum of $50, at which amount this telegram is hereby valued, unless a greater amount be stated and the higher rate be paid. Here the non-delivery was caused by the negligence of the company's servants. The Circuit Court of Appeals held that this clause had no application to interstate messages where gross negligence is present. It is held by the Supreme Court, however, that this clause has no relation whatever to any degree of negligence, but is a value agreed

upon for rate-making purposes and is controlling, even though gross negligence is found. The District Court upon the first trial decided there was no gross negligence (Tr. p. 158). The Court of Appeals construed the total failure to transmit as gross negligence and the District Court on the second trial again found (Finding XIV, Tr., p. 49):

> "That the failure to transmit and deliver said telegram under the circumstances as hereinbefore found did not constitute gross negligence unless the failure to transmit a telegram constitutes gross negligence *per se*."

The cases cited in the Opinion of the Court of Appeals in the first decision (Tr., pp. 170-171, and 272 Fed., 223) were decided *before* the Act of Congress was passed.

DECISION OF INTERSTATE COMMISSION

Since the approval of this valuation clause of the regulations by the Interstate Commerce Commission, its validity has been upheld by the decision of the Interstate Commerce Commission in

Cultra v. *Western Union Tel. Co.*, 44 I. C. C., 670;

Bailey v. *Western Union Tel. Co.*, 97 Kans., 619;

Western Union Tel. Co. v. *Schade*, 137 Tenn. 214.

The above decisions were expressly approved by this Court in *Postal Telegraph Co.* v. *Warren Godwin Lumber Co.*, 251 U. S., at page 31.

In the *Cultra* case the Commission says:

> "The liability of the carrier is limited to the sum of $50 unless a greater value is declared."

See also the cases of

Frederick v. *Western Union Tel. Co.*, 189 Iowa, 1338;
Dunham v. *Western Union Tel. Co.*, 85 W. Va., 425;
Klotz v. *Western Union Tel. Co.*, 187 Iowa, 1355;
Western Union v. *Albert*, 124 Miss. 214.

In the *Frederick* case there were present the elements of non-delivery and gross negligence. In the Opinion, based upon the recent Federal authorities, the Court said:

> "Where the telegraph company is grossly negligent it may be made to respond for such negligence beyond the price of sending such telegram, *but not to exceed fifty dollars.*"

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF THIS COURT UPHOLDING SIMILAR VALUATION CLAUSES IN THE RAILROAD AND EXPRESS CASES.

The Supreme Court has held a similar valuation clause valid in all the recent cases relating to express companies and railroads. The principal cases are:

Adams Express Co. v. *Croninger,* 226 U. S., 491;
Kansas City v. *Carl,* 227 U. S., 639;
Missouri Ry. v. *Harriman,* 227 U. S., 657;
Wells Fargo v. *Neiman-Marcus Co.,* 227 U. S., 469.

In all these cases it is held that the shipper is limited in the case of the loss of the goods to the value declared as a basis of rates without regard to the place where the negligent act occurred. The Supreme Court in its approval of the *Cultra* case has applied this doctrine to telegraph companies. *Adams Express Co.* v. *Croninger, supra,* is the first and leading case on the subject, and will be found cited and approved at almost every term of Court since it was decided in 1912. There the action was to recover the full market value of a package containing a diamond ring, which was delivered by the plaintiff below to the express company at its office in Cincinnati, Ohio, consigned to Augusta, Georgia.

"The package was never delivered." The Court

does not inquire whether the ring was lost at Cincinnati, Ohio, or at Augusta, Georgia, or at some intervening point. It simply holds that the contract declaring the value of the property fixed upon as a basis of the rate is valid, and determined the measure of damage in case the package was never delivered. In that case the valuation was $50. The clause of the contract was in substance the same as the contract here. Inasmuch as it is not dependent upon service, but is an agreement as to value in case the property is lost, it was immaterial to the case what was the degree of negligence or whether the package was lost at the *originating point or the point of destination.*

We respectfully call the Court's attention to the following paragraphs of the Opinion in *Adams Express Co.* v. *Croninger,* which we contend are controlling:

> "It has, therefore, become an established rule of the common law, as declared by this Court in many cases, that such a carrier may, by a fair, open, just and reasonable agreement, limit the amount recoverable by a shipper *in case of loss or damage to an agreed value, made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk.*"
>
> * * * * * * * * * *
>
> "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the car-

rier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. *The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation,* between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper should be upheld. There is no violation of public policy. *On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss.*" (Italics ours.)

In *Wells Fargo* v. *Neiman-Marcus Co.*, 227 U. S., the action was to recover from the express company the loss of a package of furs "shipped from New York to Dallas, Texas, *and never delivered.*" The agreement as to value in case of loss was substantially the same as in this case. The Court determines that in the case of loss the shipper is held to that declared value. The Court said:

> "The rate of freight was based upon the valuation thus fixed, and the liability should not exceed the amount so made the rate basis."

Upon this holding the judgment was reversed. There is no discussion as to whether the package was lost at the receiving office or at some intermediate point.

In *Donlon Bros.* v. *Southern Pacific Co.*, 151 Cal., 763, plaintiffs delivered to the railroad company for shipment two horses, which were valued for rate-making purposes at $20 each. The horses were injured or killed in transit through the *gross* negligence of the defendant. Plaintiff sued for $2700, their actual value. The Court held that the plaintiffs were limited to the value stated, and that the contract was not a contract limiting liability, but was a contract dealing primarily with value as a basis upon which freight rates were paid.

We can perceive no difference in respect to this value whether the horses, after they were delivered to the railroad company for shipment, were killed through the negligence of its servants at the shipping point, or at the terminal or any intermediate point.

Respondent contends that the Federal rules as to limitation of liability have no application where there is gross negligence, basing his contention on the fact that in the case of *Postal Tel. Co.* v. *Bowman-Bull Co.*, 290 Ill., 155, where there was gross negligence, this Court denied certiorari (251 U. S., 562). No opinion was filed, and therefore it does not appear what was the basis of the order. *But it is sufficient to say that in the Bowman and Bull case there was no*

valuation clause on the message blank, nor had any such regulation been filed with the Interstate Commerce Commission. Therefore the question as to the validity of such a regulation did not arise.

The Circuit Court of Appeals did not take the position that the valuation clause involved here is ineffective where gross negligence is present; but, on the contrary, said "granting such restriction is valid . . . we do not construe non-delivery as the full equivalent of non-transmission" (272 Fed., 229, Tr. p. 171), which brings us back to the question discussed above as to whether Congress by the Act of 1910 intended to take over the regulation of the whole field of interstate telegraphy, which obviously includes messages between the States that fail for any reason and at any point.

This Court, in the *Warren Godwin Lumber Co.* case, *supra,* expressly approved the *Cultra* case, the *Bailey* case and the *Schade* case (see page 37, *supra*), all of which upheld the valuation clause here under discussion.

THE CIRCUIT COURT OF APPEALS WAS NOT BOUND BY ITS RULING ON THE FORMER APPEAL

The Court of Appeals held that its decision on the former appeal had become the law of the case and was controlling of this appeal, citing some early cases and among others the case of

Messenger v. *Anderson,* 171 Fed., 785.

But this latter case was carried to the Supreme Court and decided in

Messenger v. *Anderson*, 225 U. S., 436.

It is there said by the Supreme Court, speaking through Mr. Justice Holmes, "it was held by the Circuit Court of Appeals that its own previous decision was the law of the case and it was not at liberty to reverse the judgment. In reversing this ruling the Court said:

> "In the absence of statute the phrase 'the law of the case' as applied to the effect of previous orders or the later action of the Court rendering them in the same case merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power."

The court held that the Court of Appeals should have reversed the judgment and construed the will as did the State Court, if for no other reason, because that construction "was right."

The last expression of this Court on the rule invoked is found in

Chase v. *United States*, 256 U. S., 1,

where the Court said (p. 10):

> "The proposition was a relevant and conclusive application when a judgment of a former action is pleaded, but limited application when urged

in the same suit; it expresses a practice only, and useful as such, but not a limitation of power."

Messenger v. *Anderson*, 225 U. S., 436.

See also

Moss v. *Ramey*, 239 U. S. 539.

THE RULES, REGULATIONS AND STIPULATIONS WHICH WE HAVE DISCUSSED ARE BINDING ALIKE UPON A RECEIVER OF A MESSAGE.

Gardner v. *Western Union Tel. Co.*, 231 Fed., 405.

This case was expressly approved by the Supreme Court in

Postal Tel. Co. v. *Warren Godwin Lumber Co.*, 251 U. S., 27. See page 31.

THE IMPORTANCE OF THE CASE.

The importance of this case which we deem of sufficient gravity to justify this application, arises from the fact that the validity, scope and application of the provisions of the rules and regulations and provisions limiting liability as to interstate messages are involved, which affect not only the public carrier but the vast number of persons and business concerns who employ the telegraph daily as a means of rapid communication. Petitioner respectfully asks this Court to determine the rule which shall control all

the circuits and all the inferior courts in respect to such liability, "so that," as said by the Interstate Commerce Commission in the *Cultra* case, *supra,*

Cultra v. *Western Union Tel. Co.,*

> "the charge as fixed and offered to the public by the defendant for transmitting an interstate message may no longer involve any greater or less liability in one forum than it does in another, but must be considered as attaching to the defendant's error the same degree of responsibility in all the courts."

Respectfully submitted,

FRANCIS R. STARK,
RICHARDS & HAGA,
BEVERLY L. HODGHEAD,
Counsel for Petitioner.

ADMISSION OF SERVICE

Service of a copy of the foregoing Petition, Brief, Notice, Motion, and Transcript of Record is acknowledged this 13th day of April, 1923.

RICHARD H. JOHNSON and
CAREY H. NIXON,
Attorneys for Respondents.